(17)

No. 95-1340

In the Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY, PETITIONER

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

The False Claims Act prohibits a variety of fraudulent or deceptive practices involving government funds and property. 31 U.S.C. 3729 *et seq.* The Act authorizes individual citizens (known as "relators") to bring private suits, commonly referred to as *qui tam* actions, to enforce the Act for the benefit of the United States. 31 U.S.C. 3730(b)(1). A 1986 amendment to the Act provides that "[n]o court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. 3730(e)(4)(A) (footnote omitted). This Court granted the petition for a writ of certiorari limited to the following questions:

1. Whether the courts below erred in asserting jurisdiction over this action under the *qui tam* provisions of the False Claims Act.

2. Whether injury to the public fisc is an essential element of a cause of action under the False Claims Act.

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INTEREST OF THE UNITED STATES

The False Claims Act (FCA or Act), 31 U.S.C. 3729 *et seq.*, establishes civil penalties for a variety of forms of fraud against the United States. The FCA authorizes both the Attorney General and (under certain circumstances) private parties to file civil actions to enforce the Act. The United States has a substantial interest in the correct interpretation of statutory provisions governing suits brought to redress fraud against the government. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATUTORY PROVISION INVOLVED

Section 3730 of Title 31, United States Code, is reprinted as an appendix to this brief.

STATEMENT

1. The FCA prohibits any person from "knowingly" presenting "a false or fraudulent claim for payment or approval" to the federal government. 31 U.S.C. 3729(a)(1). The Act also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). Any person who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains," for each violation of the Act. 31 U.S.C. 3729(a).

The Attorney General may bring a civil action if she finds that a person has committed a violation. 31 U.S.C. 3730(a). The Act also authorizes individual citizens (known as relators) to bring private suits, commonly referred to as *qui tam* actions. 31 U.S.C. 3730(b)(1). The Act provides that a *qui tam* action is brought "for the person [the relator] and for the United States Government." *Ibid.* When a *qui tam* action is filed, the government may intervene to take over the litigation "within 60 days after it receives both the complaint and the material evidence and information," 31 U.S.C. 3730(b)(2), or "at a later date upon a showing of good cause," 31 U.S.C. 3730(c)(3). If the government elects not to intervene, the relator "shall have the right to conduct the action." *Ibid.*

Any monetary recovery in a *qui tam* action is divided between the government and the relator. In cases in which the government does not intervene and the relator conducts the action, the relator receives between 25% and 30% of the proceeds of the action or settlement, while the United States receives the rest. 31 U.S.C. 3730(d)(2). If the government intervenes

and prosecutes the action, the relator generally receives between 15% and 25% of the proceeds. 31 U.S.C. 3730(d)(1).[1]

In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 545-548 (1943), this Court held that a *qui tam* suit under the FCA could go forward even if the allegations in the complaint were derived entirely from a criminal indictment filed by the government in a related case. Congress amended the Act shortly thereafter to preclude such "parasitical" actions.[2]

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[1] The Act provides, however, that "[w]here the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation." 31 U.S.C. 3730(d)(1) (footnote omitted).

[2] The terms "parasitical" and "parasitic" are typically used in this context to refer to *qui tam* suits whose allegations are actually derived from publicly available materials. See, *e.g.*, Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L. J. 237, 241 (1995) ("In the late 1930s, enterprising relators revived the [FCA] by bringing 'parasitic' lawsuits—lawsuits copied from preexisting indictments or based upon congressional investigations."). That appears to be the sense in which Hughes uses the terms. See Pet. Br. 2 (referring to "'parasitic' actions by relators who simply leech onto allegations of wrongdoing *already disclosed* by the Government or the news media"), 27 (referring to "'parasitic' *qui tam* actions based on information copied from a criminal indictment").

See Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 609; *United States ex rel. Wisconsin* v. *Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984) ("Congress's immediate concern in enacting the 1943 amendment was to do away with the 'parasitical suits' allowed by *Hess*."). From 1943 to 1982, the FCA provided that "[t]he court shall have no jurisdiction to proceed with any [*qui tam*] suit * * * whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." 31 U.S.C. 232(C) (1976). The substance of that jurisdictional bar was carried forward when the Act was recodified in 1982. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 979. Thus, as of 1982, the Act provided that "the court shall dismiss [a *qui tam*] action * * * on discovering the action is based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982).[3]

The courts consistently construed those versions of the jurisdictional bar to preclude *qui tam* actions even where the government had made no effort to investigate allegations of fraud, see S. Rep. No. 345, 99th Cong., 2d Sess. 12 (1986), and even where the relevant information had been brought to the government's attention by the relator himself, see *id.* at 12-13 (citing *Wisconsin*, *supra*). To address those

[3] Pub. L. No. 97-258 was intended "[t]o revise, codify, and enact *without substantive change* certain general and permanent laws, related to money and finance." 96 Stat. 877 (emphasis added). The House Report accompanying the 1982 revision and recodification explained that the language of the jurisdictional bar had been reformulated "to eliminate unnecessary words." H.R. Rep. No. 651, 97th Cong., 2d Sess. 145 (1982).

concerns, Congress further amended the jurisdictional bar in 1986. See False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3157. The current version of the bar provides:

> No court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless * * * the person bringing the action is an original source of the information.

31 U.S.C. 3730(e)(4)(A) (footnote omitted).[4]

2. This case involves a *qui tam* action filed in January 1989 by respondent William J. Schumer, then an employee of petitioner Hughes Aircraft Company. Schumer alleged that Hughes had developed and built radar components for use in its government contracts for both the B-2 bomber and the F-15 fighter plane that should have been charged entirely to the F-15 contract. Schumer contended that Hughes had violated the FCA by creating an internal "commonality agreement" that allowed the company to charge the costs of those radar components in part to the B-2 contract. See Pet. App. 3a-4a. After investigating Schumer's allegations, the Department of Justice declined to intervene to take over the litigation. *Id.* at

[4] The Act defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. 3730(e)(4)(B).

4a. Schumer then pursued the action without participation by the government.

3. Hughes moved to dismiss the suit on several grounds unrelated to the merits of Schumer's allegations. First, Hughes noted that the FCA violations were alleged to have occurred before the 1986 amendments to the Act; it argued that the suit should be governed by the law in effect at the time of the alleged violations, and that Schumer would have been barred from pursuing this matter under the jurisdictional bar found in the Act at that time. Second, Hughes contended that Schumer's suit was "based upon" a "public disclosure" of "allegations or transactions in a[n] * * * administrative * * * audit" and was therefore foreclosed even under the jurisdictional bar as amended in 1986. 31 U.S.C. 3730(e)(4)(A); J.A. 176. Finally, Hughes argued that the *qui tam* provisions of the FCA are unconstitutional. The district court summarily denied the motions to dismiss. Pet. App. 34a-35a; J.A. 196.

4. Hughes then moved for summary judgment on the merits. The district court granted that motion. See Pet. App. 36a-64a. The court found that Hughes had properly informed the government and other contractors of its use of the commonality agreements, and that no genuine issue of material fact existed as to whether Hughes had submitted a false claim. *Id.* at 4a, 64a.

5. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-31a.

a. The court first concluded that the case is governed by the current version of the FCA's jurisdictional bar provision, 31 U.S.C. 3730(e)(4), rather than by the version in effect at the time of the alleged violations. Under this Court's decision in *Landgraf*

v. *USI Film Prods.*, 511 U.S. 244, 274 (1994), the court of appeals stated, there is "a strong presumption that jurisdictional statutes apply retrospectively." Pet. App. 6a. The court found nothing in the text or history of Section 3730(e)(4) to rebut that presumption. Pet. App. 7a. The court noted in particular that the 1986 amendments to the jurisdictional bar "did not alter [the defendant's] underlying liability; [they] only altered the conditions under which a qui tam relator can bring an action to enforce that liability." *Ibid.* (quoting *United States ex rel. Lindenthal* v. *General Dynamics Corp.*, 61 F.2d 1402, 1408 (9th Cir. 1995), cert. denied, 116 S. Ct. 1319 (1996)).

b. The court of appeals next held that Schumer's suit was not precluded by the current version of the FCA's jurisdictional bar because there had been no "public disclosure" within the meaning of Section 3730(e)(4)(A). The court rejected Hughes' contention that "the dissemination of government audits to employees of [Hughes and the prime contractor] who were not involved in the alleged fraud constituted public disclosure." Pet. App. 8a. The court explained that, "in the context of defense procurement, security considerations generally require that the government, contractors, and subcontractors operate within a closed loop of secrecy. * * * Under a practical, commonsense interpretation of the jurisdictional provisions, information that was disclosed in private has not been publicly disclosed." *Id.* at 9a-10a (internal quotation marks omitted). The court held on that basis that "disclosure to company employees does not constitute public disclosure." *Id.* at 11a. The court of appeals also rejected Hughes' contention that the audits in question constituted "public disclosures" because they were potentially available to the public

under the Freedom of Information Act (FOIA), 5 U.S.C. 552. See Pet. App. 11a-13a.[5]

c. Hughes also challenged the constitutionality of the FCA's *qui tam* provisions. Hughes contended that *qui tam* relators fail to satisfy Article III standing requirements; that the *qui tam* provisions violate separation of powers principles; and that the provisions violate limitations under the Appointments Clause, Art. II, § 2, Cl. 2, on who may conduct litigation on behalf of the United States. The court of appeals rejected those arguments on the basis of its prior decisions in *United States ex rel. Kelly* v. *Boeing Co.*, 9 F.3d 743, 747-759 (9th Cir. 1993), cert. denied, 510 U.S. 1140 (1994), and *United States ex rel. Madden* v. *General Dynamics Corp.*, 4 F.3d 827, 830 (9th Cir. 1993). See Pet. App. 14a.

d. The court then considered Schumer's appeal from the district court's decision granting summary judgment to Hughes on the merits. Schumer challenged, *inter alia*, the adequacy of Hughes' disclosure to its prime contractor, the Northrop Corporation, of its method of allocating the radar costs to the B-2 contract. See Pet. App. 19a. Schumer contended that Hughes' failure to provide adequate disclosure "caused Northrop to be misled as to the costs to the B-2 program, thus creating a substantial issue as to the reasonableness of allowing the * * * charges." *Ibid.* The court of appeals concluded that genuine issues of material fact existed regarding that question. *Id.* at 19a-22a. The court also found genuine issues of material fact with respect to Schumer's claim that Hughes had failed to comply with the cost accounting statements (CAS) that it was required to submit to the government. See *id.* at 22a-26a. The court asserted in that regard that Hughes' apparent "noncompliance with the CAS may have rendered the costs unallowable." *Id.* at 25a.

[5] Because the court concluded that there had been no "public disclosure" of the audits in question, it did not address the question whether respondent's suit was "based upon" those audits, or whether respondent was an "original source" of the allegations. Pet. App. 14a; see page 5 and note 4, *supra*.

6. On October 15, 1996, this Court issued an order granting the petition for a writ of certiorari "limited to Questions 1 and 2 presented by the petition." 117 S. Ct. 293. Those questions are as follows:

> 1. Whether the courts below erred in asserting jurisdiction over this action under the *qui tam* provisions of the False Claims Act.
>
> 2. Whether injury to the public fisc is an essential element of a cause of action under the False Claims Act.

Pet. i.

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that the instant suit is governed by the current "public disclosure" provision rather than by its predecessor provision, which mandated dismissal of all *qui tam* suits based on evidence or information in the government's possession. While recognizing that "the presumption against retroactive legislation is deeply rooted in our jurisprudence," *Landgraf* v. *USI Film Prods.*, 511 U.S. at 265, this Court has made clear that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment," *id.* at 269. The Court has noted, in particular, that statutes

governing the jurisdiction of federal courts are routinely applied to cases arising out of pre-statute conduct. The Court has recognized, more generally, that statutes governing the manner in which litigation is conducted rather than the primary conduct of regulated parties may be *prospectively* applied to future litigation arising out of pre-statute activities.

Both current Section 3730(e)(4) and its predecessor version "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 511 U.S. at 274. Replacement of former Section 3730(b)(4) with the current "public disclosure" provision neither prohibited previously lawful conduct nor increased the penalties for violations. Whether or not Section 3730(e)(4) is properly characterized as a "jurisdictional" rule, it addresses the conduct of *qui tam* litigation rather than the primary conduct of persons who submit claims to the government. Application of Section 3730(e)(4) (rather than its predecessor version) to the instant suit is therefore an appropriate *prospective* application of that statutory amendment.

2. The "public disclosure" bar is not applicable to this case. Although disclosure to a defendant contractor's employees can sometimes constitute a "public disclosure," no "public disclosure" occurred here. In our view, a public disclosure occurs whenever allegations or transactions are revealed to any person outside the government other than the suspected wrongdoer, so long as that person is under no duty not to reveal the information to others. Under the circumstances of this case, where the record as it comes to this Court reveals no dissemination of the audit reports beyond those employees specifically designated by Hughes to review them on the company's behalf, the disclosures in question are properly regarded as having been made not to the individual employees *qua* individuals, but to the company itself. Because the disclosures have not been shown to extend beyond the suspected wrongdoer (the company), the limited dissemination of the audit reports was insufficient to place them in the public domain.

3. The text and history of the FCA make clear that a showing of pecuniary injury to the United States is not a requisite element of a cause of action for civil penalties. Indeed, Hughes has essentially abandoned the contention that proof of injury to the public fisc is required. Hughes now argues, however, that a claim is "false or fraudulent" within the meaning of the Act only if it involves "the submission of an inflated request for payment." Pet. Br. 39. That argument reflects an unduly narrow conception of the FCA's proscriptions.

In our view, a claim is "false or fraudulent" within the meaning of the Act whenever it misstates facts bearing on the claimant's entitlement to payment, regardless of whether the misstatement relates to the quality of the goods or services provided or the appropriateness of the price charged. For example, statutory and regulatory provisions regarding the government's acquisition of goods and services frequently establish eligibility criteria (*e.g.*, a requirement that American-made components be used) that are designed to serve purposes other than simply to ensure the quality and price of the goods or services obtained. A claimant's misrepresentation of compliance with such criteria is sufficient to render the claim "false or fraudulent," even if the claimant accurately describes the goods or services provided, and even if those goods or services are of the sort for

which payment is generally authorized. The FCA thus reaches claims that undermine a federal program by diverting its benefits to persons other than the intended recipients, even where the injury to the government is not naturally characterized as "pecuniary" in nature.

4. The government takes no position regarding the merits of Schumer's FCA claims. We note, however, our disagreement with three aspects of Hughes' argument. First, we do not read the court of appeals' opinion to suggest that every statutory or regulatory violation committed by a government contractor will give rise to liability under the FCA. Second, we disagree with the suggestion that a failure to provide accurate information regarding accounting methods would constitute a mere "technical" violation. Finally, we do not agree that the government's payment of the claims in question precludes any subsequent challenge to the allowability of the costs.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE CURRENT VERSION OF THE FCA'S JURISDICTIONAL BAR, 31 U.S.C. 3730(e)(4), APPLIES TO THE INSTANT SUIT

At the time of the FCA violations alleged in this case, the Act provided that "the court shall dismiss [a *qui tam*] action * * * on discovering the action is based on evidence or information the Government had when the action was brought." 31 U.S.C. 3730(b)(4) (1982); see page 4, *supra*. Effective October 27, 1986, the Act was amended to provide that "[n]o court shall have jurisdiction over [a *qui tam*] action * * * based upon the public disclosure of allegations or transactions in" specified fora. 31 U.S.C. 3730(e)(4)(A); see

False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. Hughes contends (Pet. Br. 14-22) that the court of appeals erred in adjudicating Schumer's suit under the current version of the FCA's jurisdictional bar, rather than under the version in effect at the time of the alleged wrongdoing. We disagree.

A. In *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994), this Court recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." The Court also observed, however, that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269. The Court noted, for example, that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. The Court explained that "[p]resent law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Ibid.*; see also *id.* at 292 (Scalia, J., concurring in the judgments) (noting the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction").

Both current Section 3730(e)(4) and its predecessor "speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf*, 511 U.S. at 274 (internal quotation marks omitted); see Pet. App. 6a-7a. Replacement of former Section 3730(b)(4) with the current "public disclosure" provision neither prohibited previously lawful conduct nor

increased the penalties for violations. The statutory amendment therefore did not alter either the existence or the extent of Hughes' liability to the government; it simply expanded the circumstances under which *qui tam* relators may pursue actions to enforce that liability. See Pet. App. 7a.[6] Application of the current Section 3730(e)(4) to the instant suit is thus consistent with this Court's decision in *Landgraf*.

B. Although we believe that Section 3730(e)(4) is properly characterized as a "jurisdictional" rule,[7] the

[6] We therefore disagree with Hughes' assertion that the 1986 version of the jurisdictional bar "self-evidently expands an FCA defendant's liability." Pet. Br. 16. As the Ninth Circuit observed in an earlier case, "[p]roof that the government had the information when suit was brought was not an 'absolute defense' under the preamendment FCA. Rather, it was simply a jurisdictional defense to an action brought by a qui tam relator, as opposed to an action brought directly by the government." *United States ex rel. Lindenthal* v. *General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), cert. denied, 116 S. Ct. 1319 (1996). Nor do we see merit in Hughes' reliance (Pet. Br. 17) on cases holding that particular statutory amendments creating private rights of action would not be applied to suits involving alleged pre-amendment misconduct. None of the cited cases suggests that the remedies sought by the private plaintiffs had previously been available in enforcement actions brought by the government.

[7] Section 3730(e)(4)(A) is phrased as a jurisdictional limitation, providing that "[n]o court shall have jurisdiction over" a *qui tam* action based upon defined categories of public disclosures. 31 U.S.C. 3730(e)(4)(A). From 1943 to 1982, the Act provided that "[t]he court shall have no jurisdiction to proceed with" a *qui tam* suit "based upon evidence or information in the possession of the United States." 31 U.S.C. 232(C) (1976). Although the 1982 revision and recodification of Title 31 eliminated the word "jurisdiction" from that provision, the text and history of the 1982 revision make clear that no substantive change was intended. See note 3, *supra*.

propriety of applying Section 3730(e)(4) to the instant case does not depend on that characterization. The principle that new jurisdictional statutes apply to cases involving pre-statute conduct is not an exception to the presumption against retroactive application of statutory changes. Rather, the Court's approach to jurisdictional statutes reflects a more general recognition that a statute governing the conduct of litigation rather than the primary conduct of regulated parties may be *prospectively* applied to future litigation arising out of pre-statute activities. Cf. *Landgraf*, 511 U.S. at 275 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive."); *id.* at 293 (Scalia, J., concurring in the judgments) ("[T]he purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.").[8] Whether or not Section

In the district court, Hughes relied on Section 3730(e)(4) in moving to dismiss Schumer's suit "for lack of subject matter jurisdiction." J.A. 176; see Pet. 4. Indeed, the petition for a writ of certiorari sought review of the question "[w]hether the courts below erred in asserting jurisdiction over this action under the *qui tam* provisions of the False Claims Act." Pet. i. The petition repeatedly characterized Section 3730(e)(4) as a "jurisdictional bar." See Pet. 2, 5, 8, 9, 10, 11. In its brief on the merits, by contrast, Hughes has reformulated the question presented (see Pet. Br. i) and now contends that "it is far from clear whether the word 'jurisdiction' in § 3730 defines a court's subject-matter jurisdiction at all." Pet. Br. 21.

[8] We therefore disagree with the court of appeals' assertion that the Court in *Landgraf* "carved out an exception to [the

3730(e)(4) is properly characterized as a "jurisdictional" rule, it addresses the conduct of *qui tam* litigation rather than the primary conduct of persons who submit claims to the government. Application of Section 3730(e)(4) to the instant suit therefore does not constitute retroactive application of that statutory amendment.

C. As Hughes observes (Pet. Br. 15), legislation may be said to operate retroactively where it "attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. At bottom, Hughes' argument is that Section 3730(e)(4) "attaches new legal consequences" to prior events because it increases the practical likelihood that Hughes' prior conduct will become the subject of FCA litigation that culminates in a judgment against the company. The same might be said, however, of a statute that authorized the hiring of additional government investigators or attorneys or the creation of an Independent Counsel, or one that transferred enforcement responsibility to a different (and perhaps more aggressive) federal agency. Because the replacement of former Section 3730(b)(4) with current Section 3730(e)(4) neither prohibited previously lawful conduct nor increased the penalties for violations, application of the amended provision to Schumer's suit does not constitute retroactive application of the new law. Cf. *California Dep't of Corrections* v. *Morales*, 115 S. Ct. 1597, 1601 (1995) (a criminal statute violates the Ex Post Facto Clause only if it "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts") (quoting

presumption of nonretroactivity] in the case of jurisdictional statutes." Pet. App. 6a.

Collins v. *Youngblood*, 497 U.S. 37, 41 (1990)); *Landgraf*, 511 U.S. at 269 n.23, 275 n.28 (invoking Ex Post Facto precedents in delineating civil retroactivity rules).[9]

II. THE COURT OF APPEALS CORRECTLY HELD THAT SCHUMER'S SUIT WAS NOT SUBJECT TO DISMISSAL UNDER THE AMENDED JURISDICTIONAL BAR

Hughes next contends (Pet. Br. 23-37) that Schumer's suit is barred even under current Section 3730(e)(4) because the disclosure of the government audits to Hughes' own employees constituted a "public disclosure."[10] Again, we disagree.

Under Section 3730(e)(4), unless the relator is an "original source" of the information on which the suit is based (see note 4, *supra*), federal courts lack jurisdiction of *qui tam* actions "based upon the public disclosure of allegations or transactions" in specified fora. Thus, a *qui tam* suit may proceed under Section 3730(e)(4) if, but only if, one of the following three conditions is met: (1) there has been no prior "public disclosure" of the allegations or transactions upon which the suit is based; (2) although there has been a

[9] It does not follow, however, that *all* provisions of the 1986 FCA amendments apply to cases filed after enactment that challenge pre-enactment conduct. Rather, a court "should evaluate each provision of the [amendments] in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct." *Landgraf*, 511 U.S. at 280.

[10] Hughes has abandoned the contention made in its petition for a writ of certiorari (see Pet. 16-18) that the potential availability of the government audits pursuant to the Freedom of Information Act (FOIA) constituted a "public disclosure."

"public disclosure," the suit is not "based upon" such disclosure; or (3) the relator qualifies as an "original source." In this case, at least insofar as the facts have been developed to this point, we believe there has been no "public disclosure" within the meaning of the statute. Thus, it is unnecessary to determine either (1) whether or not Schumer's suit is "based upon" the allegations or transactions addressed in the audit reports or (2) whether Schumer would constitute an "original source."[11]

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[11] With respect to the "based upon" inquiry, a circuit conflict exists regarding the proper application of Section 3730(e)(4)(A) to situations in which the allegations of a *qui tam* complaint, though substantially similar to allegations that had previously been publicly disclosed, were derived independently (in whole or in part) from the public materials. At least three courts of appeals have concluded that Section 3730(e)(4)(A) applies whenever the allegations or transactions described in the relator's complaint have previously been the subject of a public disclosure, whether or not the relator actually derived his complaint from materials in the public domain. See *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) ("Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information."); *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1417-1419 (9th Cir. 1992); *United States ex rel. Cooper* v. *Blue Cross Blue Shield of Fla.*, 19 F.3d 562, 567 (11th Cir. 1994). The Fourth Circuit has taken the contrary view, holding that "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based." *United States ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1348, cert. denied, 115 S. Ct. 316 (1994). While the view of the Tenth Circuit is not entirely clear, it appears to agree with the majority. In *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993), after stating that "an FCA *qui tam* action even partly based upon publicly disclosed

With respect to the general principles governing the interpretation of the phrase "public disclosure" in Section 3730(e)(4), the government is in substantial accord with Hughes' analysis. We agree (see Pet. Br. 33) that the disclosure need not be widespread or extend to the *general* public. Like Hughes (see *id.* at 25-26), moreover, we disagree with the court of appeals' apparent conclusion (see Pet. App. 8a-11a) that disclosure to a defendant contractor's employees cannot, under any circumstances, constitute a "public" disclosure. In our view, a public disclosure occurs whenever allegations or transactions are revealed to any person outside the government other than the suspected wrongdoer, so long as that person is under no duty not to reveal the information to others.[12] That legal standard appears substantially, if

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allegations or transactions" is jurisdictionally barred, 971 F.2d at 552, the court then dismissed the complaint merely upon a showing that a "substantial identity" existed between material that had been publicly disclosed and the material in the complaint, *id.* at 553.

The court below declined to address this issue in light of its conclusion that no "public disclosure" had occurred in this case. Pet. App. 14a. Because we agree that the record does not reveal a "public disclosure," we believe this case would be an inappropriate vehicle for resolution of the circuit conflict described above. Hughes apparently agrees. See Pet. Br. 24 n.9.

[12] In the circumstances specified in the statute—particularly where there has been a public disclosure through specified types of government reports and actions—it is likely that the government is already investigating the matter, or appropriate government investigatory personnel have sufficient information to trigger an investigation. Unless the relator is an "original source," *qui tam* lawsuits brought in these circumstances—after a public disclosure has occurred showing that the government is itself taking action or is capable of taking action—

not entirely, consistent with the test Hughes advocates. See Pet. Br. 25-26.[13]

Our disagreement with Hughes concerns the proper application of the governing principles to the instant case. Because the issue of Section 3730(e)(4)'s application to this case arises in the context of a motion to dismiss, any ambiguities in the record before the Court must be resolved in favor of Schumer, the non-moving party. See, *e.g.*, *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 889 (1990); *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1980); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). As far as we can determine, the audit reports at issue in this case were sent from the government to Hughes as the suspected corporate wrongdoer; individual employees received the audits only insofar as they were designated by Hughes management to receive and analyze them on behalf of the company. Those employees presumably received the documents

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are likely to bring the Treasury nothing more than what government prosecutors would have recovered on their own initiative, and they divert a portion of that recovery unnecessarily from the Treasury to private hands.

[13] Under the standard described in the text, the question whether information revealed to a corporate defendant's employees is the subject of a "public disclosure" cannot appropriately be resolved on the basis of a per se rule. An agency record released to an employee of a corporate defendant in response to a FOIA request, for example, would surely constitute a "public disclosure." The employee would receive the record in his capacity as a member of the public, and his status as a corporate employee would place no restrictions on his entitlement to disseminate the material to a wider audience. By contrast, no "public disclosure" would occur if the government revealed information to a corporate employee upon the express condition that he would not convey it to others.

upon the understanding that they would use the information contained therein only in furtherance of Hughes' business. Under those circumstances, the disclosures are properly regarded as having been made not to the individual employees *qua* individuals, but to the company itself. Because the disclosures in question have not been shown to extend beyond the suspected wrongdoer (the company), the limited dissemination of the audit reports was insufficient to place them in the public domain. Compare *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 319-320, 323 (1992) ("public disclosure" occurred where government investigators communicated allegations to contractor employees who were found on the premises during raid of defendant's business, and who were "under no obligation to keep th[e] information confidential").[14]

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[14] Hughes asserts (Pet. Br. 35-36) that the audits at issue in this case were disclosed to employees of the prime contractor (Northrop) as well as to petitioner's own employees. The record material cited by Hughes (see Pet. Br. 36 (citing J.A. 30)) does not support that contention. As far as we can determine from the record, the only audit report disclosed to the prime contractor was the classified Air Force Audit 86-5, which was not declassified until September 5, 1990, 19 months after this *qui tam* suit was filed. See Exhibit 1 to Affidavit of John F. Wilson, filed as Exhibit 62 to Hughes' Exhibits in Support of Motion for Summary Judgment, filed 1/27/92 (showing declassification stamp). Because that audit report was classified at the time the *qui tam* suit was filed, its disclosure to Northrop could not have qualified as a "public disclosure." The Northrop custodian of records was able to identify no other relevant government audit reports in Northrop's possession. See Declaration of Laurie L. Bilbruck and Attachments, dated 10/12/90, filed as Attachment D to Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed 10/15/90. To the extent that the record is ambiguous regarding the nature or extent of

Hughes' principal contention is that all disclosures to a contractor's employees should be treated as "public" disclosures in order to ensure that "parasitic" *qui tam* actions are precluded by Section 3730(e)(4). Hughes contends that "if the Ninth Circuit's rule is upheld, every government audit or investigation can be expected to spin off its own 'parasitic' *qui tam* action." Pet. Br. 37. Although we agree that as a general matter "the employees of government contractors are * * * the 'paradigm' relators" (*id.* at 35), we see no reason to believe that the narrow group of employees designated *by the contractor itself* to receive and evaluate government audits will be a frequent source of *qui tam* litigation. We therefore believe that Hughes substantially overstates the danger that "parasitic" *qui tam* suits will proliferate if the instant suit is allowed to go forward. Under the functional test we urge, moreover, contractors like Hughes have it within their own control to calibrate the risk of *qui tam* suits based upon audit reports provided to the company by expanding or shrinking the number of corporate representatives to whom the reports are provided.

Moreover, the FCA provides an additional protection against "parasitic" *qui tam* actions even in cases where Section 3730(e)(4) does not bar litigation. Where the government intervenes to take over a *qui tam* suit, the relator is generally entitled to between 15% and 25% of any monetary recovery. 31 U.S.C. 3730(d)(1). The relator in such cases may recover no more than 10% of the proceeds, however, if the action

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any disclosures to Northrop, the ambiguities must be resolved in Schumer's favor in the current posture of the litigation. See page 20, *supra*.

is "based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." *Ibid.* (footnote omitted). That provision does not require that the "disclosures" in question be "public." Thus, even where the jurisdictional bar is inapplicable, the Act provides for a suitable reduction (to zero, if appropriate) of the relator's share of any recovery if the *qui tam* suit is "parasitic" in nature and makes no substantial contribution to the discovery or remediation of fraud.

III. INJURY TO THE PUBLIC FISC IS NOT AN ESSENTIAL ELEMENT OF A CIVIL ACTION BROUGHT UNDER THE FCA

In its petition for a writ of certiorari, Hughes sought review of the question "[w]hether injury to the public fisc is an essential element of a cause of action under the False Claims Act." Pet. i. In its brief on the merits, however, Hughes has reformulated the question presented (see Pet. Br. i), essentially abandoning the contention that recovery of civil penalties under the FCA requires a showing of injury to the public fisc. Hughes continues to argue (see Pet. Br. 37-43), however, that the court of appeals erred in reversing the district court's award of summary judgment.

As we explain below, the court of appeals correctly held that the FCA does not require a showing of injury to the public fisc. Because Hughes' other arguments are not fairly included within the question

presented, this Court should decline to address them. In any event, those arguments lack merit.

A. The FCA provides in pertinent part that

> [a]ny person who —
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval
>
> * * * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. 3729(a). The text of the statute thus makes clear that a showing of pecuniary injury to the United States is not a requisite element of a cause of action for civil penalties. Rather,

> the statute attaches liability * * * to the 'claim for payment.' Indeed, a contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss.

United States v. *Rivera*, 55 F.3d 703, 709 (1st Cir. 1995). The Senate Report accompanying the 1986 FCA amendments confirms that "[t]he United States is entitled to recover [civil penalties] solely upon proof that false claims were made, without proof of any damages." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986) (citing *Fleming* v. *United States*, 336 F.2d 475,

480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965)). Accord *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 152-153 & n.5 (1956).

B. In its brief on the merits, Hughes now argues not that a showing of actual injury to the public fisc is an essential element of an FCA cause of action, but, instead, that a claim is "false or fraudulent" within the meaning of the Act only if it involves "the submission of an inflated request for payment." Pet. Br. 39. That argument reflects an unduly narrow conception of the FCA's proscriptions.[15]

"In the various contexts in which questions of the proper construction of the [FCA] have been presented, the Court has consistently refused to accept a rigid, restrictive reading." *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968). Rather, the Court has construed the Act to extend to "all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233. In our view, a claim is "false or fraudulent" within the meaning of the Act whenever it misstates facts bearing on the claimant's *entitlement to payment*, regardless of whether the misstatement relates to the character or quality of the goods or services provided or the appropriateness of the price charged.

For example, a false certification of compliance with contractual specifications renders a claim for payment "false or fraudulent" within the meaning of

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[15] The current False Claims Act was enacted into positive law in 1982 as an exclusively civil statute containing its own liability provisions. The fact that a prior incarnation of the statute contained a criminal component does not render the civil FCA criminal or quasi-criminal in nature. Hughes' reliance (see Pet. Br. 41-42) on criminal cases and on the rule of lenity is therefore misplaced.

the Act whether or not the deviation is shown to affect the quality of the product supplied. See, *e.g.*, *United States* v. *Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972) ("The mere fact that the item supplied under contract is as good as the one contracted for does not relieve defendants of [FCA] liability if it can be shown that they attempted to deceive the government agency."). In addition, statutory and regulatory provisions regarding the government's acquisition of goods and services frequently establish criteria that are designed to serve ancillary social policies, rather than simply to ensure the quality of the goods or services obtained. For example, in *United States* v. *Rule Indus.*, 878 F.2d 535, 536-538 (1st Cir. 1989), the defendant's false certification that the hacksaw blades it manufactured were "domestic end products" within the meaning of the Buy American Act was held to be actionable under the FCA, even though no question was raised as to the quality or price of the blades.[16] A claimant's misrepresentation of compliance with such criteria is sufficient to render the claim "false or

[16] See also, *e.g.*, *United States ex rel. Fallon* v. *Accudyne Corp.*, 880 F. Supp. 636, 638 (W.D. Wis. 1995) (complaint stated FCA cause of action where it alleged that contracts between defendant and the government "expressly required compliance with environmental regulations and that defendant knowingly failed to comply with such regulations and falsely certified that it had so complied in order to induce payments under the contracts"); *Ab-Tech Constr., Inc.* v. *United States*, 31 Fed. Cl. 429, 431, 434 (1994) (FCA was violated by contractor's misrepresentation that it satisfied the eligibility requirements for a program designed to benefit small businesses controlled by "socially and economically disadvantaged individuals," since that misrepresentation "caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the * * * program"), aff'd, 57 F.3d 1084 (Fed. Cir. 1995).

fraudulent," even if no dispute exists as to the quality of the goods or services provided, and even if those goods or services are of the sort for which payment is generally authorized. Thus, while "[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA," a claimant's "false certification of compliance [with the law] * * * creates liability when certification is a prerequisite to obtaining a government benefit." *United States ex rel. Hopper* v. *Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (emphasis omitted). The legislative history accompanying the 1986 FCA amendments reflects Congress's understanding and approval of that principle. See S. Rep. No. 345, *supra*, at 9 ("A false claim for reimbursement under the Medicare, Medicaid or similar program is actionable under the act, * * * and such claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program.").

In *Rex Trailer*, *supra*, this Court applied that principle to the analogous civil penalty provisions of the Surplus Property Act of 1944, 50 U.S.C. App. 1635 (1946). In order to facilitate the re-entry of World War II veterans into civilian life, that Act "gave veterans a priority for the purchase of surplus property, * * * thus afford[ing] veterans an opportunity to purchase goods not available elsewhere at a fair price and on good credit terms." 350 U.S. at 150. The defendant in *Rex Trailer* had obtained five surplus trucks by presenting false certificates of veteran status. *Ibid.* Relying upon its earlier decision in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), a False Claims Act case, the Court held that the assessment of civil penalties was proper. 350 U.S. at 152-154. The Court found it "obvious that injury to the Govern-

ment resulted from the * * * fraudulent purchase," explaining that the violation had "precluded bona fide sales to veterans, decreased the number of motor vehicles available to Government agencies, and tended to promote undesirable speculation." *Id.* at 153.

The decision in *Rex Trailer* reflects the recognition that the harm caused by fraud against the government often is not limited to injury to the public fisc. The economic aspect of the transaction at issue in *Rex Trailer*—the exchange of cash for trucks—was exactly as the government understood it to be. Rather, the defendants' fraudulent efforts to obtain the government's property were objectionable because they caused injury to the federal *program*, by diverting its benefits to persons other than the intended recipients, thereby impairing its efficacy in achieving the statutory purposes. Continued recognition of that principle, and of its application to the FCA, is of central importance in enforcing compliance with conditions imposed by the government upon the receipt of public funds. Thus, while a "claim for payment or approval" is "false or fraudulent" only if it misstates facts bearing upon the claimant's entitlement to receive money or property from the federal government, the claim need not be "inflated" or demand an exorbitant payment for any goods or services rendered.

C. The government takes no position regarding the merits of Schumer's FCA claims or the correctness of the Ninth Circuit's holding that Schumer had raised genuine issues of material fact.[17] We do wish,

[17] At least insofar as *qui tam* actions under the FCA are concerned, we disagree with the court of appeals' suggestion (see Pet. App. 22a-23a) that a new claim raised for the first time at the summary judgment stage may be treated as a de facto amendment to the complaint. The FCA requires that a *qui tam* complaint must be filed under seal and served upon the government, in order that the government may have an adequate opportunity to investigate the allegations and determine whether to intervene and proceed with the action. 31 U.S.C. 3730(b)(2). Those requirements would be subverted by the addition of new claims in unsealed pleadings. In the instant case, however, we believe that the allegation of non-compliance with the Cost Accounting Standards was fairly encompassed within the allegations of the original complaint. See J.A. 73-81.

however, to note our disagreement with three aspects of Hughes' argument.

First, we do not read the court of appeals' opinion to suggest that "the FCA proscribes any and all statutory or regulatory infractions by a government contractor." Pet. Br. 42. Rather, the court determined that material issues of fact remained regarding the allowability of some of the costs for which Hughes submitted claims. See Pet. App. 19a, 25a; Pet. Br. 43 n.26. A misstatement bearing on Hughes' entitlement to payment would render the claim "false or fraudulent." If the court of appeals erred in concluding that the allowability of those costs was open to dispute, its error involved the arcana of government contracting regulations, not the proper interpretation of the FCA.

Second, we disagree with Hughes' suggestion (see, *e.g.*, Pet. Br. 38) that a failure to provide accurate information regarding its accounting methods would constitute a mere "technical" violation. The Department of Defense is directed by statute to require high-dollar-value contractors and subcontractors to "disclose in writing their cost accounting practices." 41 U.S.C. 422(h)(1)(A). That requirement is imposed "as a condition of contracting with the United

States." 41 U.S.C. 422(h)(1). Submission of an accurate disclosure statement is essential so that the government can evaluate the true cost of the proposal and assess the propriety of the contractor's pricing methods.

Finally, we disagree with Hughes' contention (see Pet. Br. 43-44 n.26) that the Administrative Contracting Officer's letter (Pet. App. 67a-68a) and the government's subsequent payment of the claims in question precludes any subsequent challenge to the allowability of the costs. The letter on which Hughes relies addressed only one Cost Accounting Board standard (No. 401); it made no finding concerning allowability; and it does not bear any of the required characteristics of a "decision" by the contracting officer that may be given preclusive effect. See 41 U.S.C. 605(a); 48 C.F.R. 33.211(a)(4)(v). Even if the contracting officer had issued a decision as to allowability, moreover, a showing of fraud or mistake would always provide a basis to reconsider the decision, as is made clear by the authority on which Hughes relies. See John Cibinic, Jr. & Ralph C. Nash, Jr., *Cost-Reimbursement Contracting* 1105 (2d ed. 1993); see also 41 U.S.C. 605(a) (contracting officer may not issue a decision concerning allowability on a matter involving fraud). Indeed, in recommending that the suspended costs be released, the contracting officer noted that "the Government does not waive rights to a share in any settlement resulting from the parallel qui tam action in the event the relator's case is successful," J.A. 137—a reservation of rights obviously inconsistent with any notion that the government's payment of claims would be preclusive of Schumer's suit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The False Claims Act, 31 U.S.C. 3730, provides as follows:

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by

affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall

have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to

an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such ex-

penses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional,

administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any

special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.